Filed 3/15/10 P. v. Guerrero and Reyes CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JESUS ANTONIO GUERRERO and JUAN MANUEL REYES, Defendants and Appellants.	G039743 (Super. Ct. No. 05WF3659) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed.

J. Courtney Shevelson, under appointment by the Court of Appeal, for Defendant and Appellant Jesus Antonio Guerrero.

Robert Z. Corrado for Defendant and Appellant Juan Manuel Reyes.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Jesus Antonio Guerrero and Juan Manuel Reyes were convicted of first degree murder and other crimes stemming from their participation in a shooting at Santiago High School in Garden Grove. Guerrero, the shooter, contends the jury instructions on self-defense and defense of others were flawed, and Reyes contends there is insufficient evidence to support the jury's finding the shooting was gang related. Reyes also alleges ineffective assistance of counsel, prosecutorial misconduct and instructional error. We find appellants' arguments unmeritorious and affirm the judgment.

FACTS

Appellants are members of Hard Times, a criminal street gang whose enemies include the Santa Nita gang. Members of both gangs attend Santiago High School. One day, Reyes "hit up" Abraham Ortega at the school by asking him what gang he was in. When Ortega replied "Santa Nita," Reyes said, "Fuck Santa Nita, this is Hard Times." Although such verbal jousting between gang members often leads to violence, in this instance, campus security showed up, and nothing came of it.

Five days later, shortly after school let out, the gangs crossed paths again. Santos Gomez arrived at the rear of the school with fellow Santa Nita members Alejandro Chavez and Danny Funes in tow. Funes crossed out some Hard Times graffiti that was on a wall and replaced it with "VSN," which stands for Varrio Santa Nita, and the words "now what?" It didn't take long before the group, which soon included Ortega, drew the attention of others.

Hard Times member Juan Manzanares spotted them first. He talked to Baltzar Moreno about the situation, and the two of them tracked down Reyes, who was hanging out at the school quad with several other Hard Times members. Manzanares told Reyes about the Santa Nita members, whom he derogatorily referred to as "chonklas," and said, "[W]e are going to get them." Manzanares, Reyes and Moreno then set off to confront their rivals.

As they made their way to the back of the school, Manzanares phoned appellant Guerrero several times. He told him where the Santa Nita members were and urged him to bring a gun to that location. However, Manzanares didn't wait for Guerrero to arrive before instigating a confrontation. With Reyes and Moreno at his side, he asked Ortega where he was from. Ortega said Santa Nita, and one of his companions made a gang sign with his fingers. Moreno then yelled out, "Fuck Santa Nita, this is Hard Times," and with that, the two groups started fighting.

Santa Nita initially had a four-to-three advantage in terms of manpower, but Hard Times supporter Rene Garcia soon joined in to even the numbers. At one point during the fight, someone from Hard Times said something like, "Where the fuck is Abel?" Then Guerrero, whose nickname is "Evil," and fellow Hard Times member Armando Solana came running up to the scene. Guerrero was holding a gun, and upon seeing him, the four Santa Nita members retreated to Gomez's nearby jeep. As they started to drive away, Solano told Guerrero "not to do it here," but someone else yelled "dump on them." At that point, Guerrero fired several shots at the jeep, one of which struck and killed Ortega.

Gang expert Jonathan Wainwright testified to the rivalry between Hard Times and Santa Nita, describing them as "turf-orientated" Hispanic street gangs. He also described the criminal activities of Hard Times, explaining that gang members often commit acts of violence to induce fear and achieve respect in the community. Based on the circumstances of this case, Wainwright believed appellants acted in association with, and for the benefit of, Hard Times when they confronted Santa Nita and killed Ortega. In fact, he said appellants' actions were indicative of "a classic gang hit-up which ultimately ended in a homicide."

Appellants were charged with murder, three counts of attempted murder, shooting at an occupied vehicle, shooting in a school zone and street terrorism. Gang and firearm enhancements were also charged, as was the special

circumstance allegation that appellants intentionally committed the murder while they were active participants in, and to further the activities of, a criminal street gang. The jury convicted on all counts and found all of the enhancement allegations to be true. Thereupon, the court sentenced appellants to life in prison without the possibility of parole.

I

Guerrero argues the court's instructions on self-defense and the defense of others were unduly restrictive in terms of describing the law on antecedent threats. We disagree.

Pursuant to CALCRIM No. 505, the court instructed the jury Guerrero was justified in using deadly force if he reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury. As part of that instruction, the court explained, "When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. [¶] . . . . [¶] If you find that Abraham Ortega threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable. If you find that the defendant knew that Abraham Ortega had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable."

Guerrero claims that because the instructions referred to Ortega specifically, the jury was precluded from considering the impact of "antecedent threats by others associated with Ortega," particularly his fellow gang members. In considering this claim, we must keep in mind that jury instructions "'should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000)

78 Cal.App.4th 1107, 1112.) We "'assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]'" (*Id*. at p. 1111.) And unless there is a reasonable likelihood the jury misunderstood the challenged instruction, we must uphold the court's charge to the jury. (*People v. Cain* (1995) 10 Cal.4th 1, 36; *People v. McPeters* (1992) 2 Cal.4th 1148, 1191.)

Although Ortega was the only person identified in the above instructions, the court gave other instructions that expanded on the antecedent threats doctrine. To wit, the court told the jury that, "If you find [Guerrero] received a threat *from someone else that he reasonably associated with Abraham Ortega*, you may consider that threat in deciding whether [he] was justified in acting in self-defense or defense of another." (Italics added.) This instruction clearly signaled to the jury that Ortega was not the only person whose prior threats may have mattered in the case. Rather, the jury could also consider the effect of any threats Guerrero may have received from people who associated with Ortega, which would logically include his fellow gang members.

That being the case, the instructions did not violate Guerrero's rights. Because it is not reasonably likely the jury construed the instructions in the limiting fashion that Guerrero fears, we reject his claim of instructional error.

II

Reyes claims there is insufficient evidence to support the jury's finding the shooting was gang related, but that is not the case.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the

evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) A reversal "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the judgment].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Reyes argues there is insufficient evidence to support the jury's findings he assisted, furthered or promoted the criminal activities of his gang. (Pen. Code, § 186.22, subds. (a) [street terrorism], (b) [gang enhancement].) In so arguing, he correctly notes that gang affiliation alone is insufficient to prove a crime is gang related. Indeed, not every crime committed by a gang member is done to benefit the member's gang. (See, e.g., *People v. Albarran* (2007) 149 Cal.App.4th 214 [defendant's gang status alone deemed insufficient to support allegations that shooting in question was gang related].) However, in this case there is substantial evidence the shooting was carried out to benefit Hard Times. In reaching this conclusion we rely not only on the simple fact of Reyes' gang status, but the totality of the circumstances surrounding the shooting.

Hard Times and Santa Nita are bitter enemies, and that enmity evidenced itself several days before the shooting when Reyes confronted Ortega at school. At that time, Reyes threw down the gauntlet by telling Ortega, "Fuck Santa Nita, this is Hard Times." That set the stage for the gathering of Ortega and his fellow Santa Nita members at the school a few days later. When Reyes and his friends found out they were there, they set a confrontation plan in motion and enlisted Guerrero for armed support. They were clearly prepared to do maximum damage to their long-time gang foe.

As the two groups were facing off, Manzanares fanned the gang flames even more by asking Ortega where he was from. Ortega (verbally) and one of his companions (through hand signs) asserted "Santa Nita," and in response, Moreno cursed Santa Nita and proclaimed "Hard Times." And with that, the two gangs began

to battle. Reyes and his companions were not faring very well at first, but Guerrero soon arrived with the requested gun. Coming to the aid of his fellow gang members, he fired several shots at the Santa Nita members as they tried to get away. The arrival of armed gang members at a confrontation between rival gangs hardly seems coincidental.

Based on all the circumstances, the jury could reasonably find Reyes was guilty of assisting, furthering or promoting the criminal activities of his fellow gang members. Indeed, it readily appears the members of Hard Times were working in concert to achieve dominance over a rival outfit when Guerrero opened fire during the fight. As gang expert Wainwright explained, such acts of violence are the currency by which respect is earned in the gang community. But it wasn't just the fact that appellants belonged to a criminal street gang that convinced Wainwright the shooting was gang related; he also considered the history of the two gangs, as well as the underlying circumstances of the shooting, to arrive at this conclusion. Thus, the premise of Reyes' argument — that he was convicted based on his gang status alone — is simply not correct.

Reyes takes aim at Wainwright's testimony, claiming it amounted to improper character and profile evidence. However, Wainwright's testimony was not used to establish Reyes' propensity for criminal behavior, as he alleges. Rather, it was properly admitted to help the jury understand the culture of criminal street gangs and supply a motive for the shooting, issues that logically bore on the charges before the jury. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369-1370.) Moreover, Wainwright did not, as Reyes suggests, impermissibly speculate as to what he or his fellow gang members were thinking at the time of the shooting. (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 [expert may not opine as to what the defendant knew or intended on a particular occasion].)

Therefore, his expert testimony was properly admitted, and we may rightfully consider it for the purpose of assessing Reyes' claims.

In light of all the evidence that was presented, expert and nonexpert alike, we conclude there is substantial evidence to support the jury's finding the crimes were gang related. We therefore reject Reyes' challenge to the sufficiency of the evidence on the gang charges.

III

Reyes contends his attorney was ineffective for failing to move for a separate trial or to bifurcate the gang charges. Again, we disagree.

A defendant alleging ineffective assistance of counsel "'"must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice."' [Citation.] Prejudice occurs only if the record demonstrates 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 728.)

As for defense counsel's failure to seek a separate trial for Reyes, the law is clear that "[w]hen two or more defendants are jointly charged with any public offense, . . . they must be tried jointly, unless the court orders separate trials." (Pen. Code, § 1098.) This rule embodies the legislative preference for joint trials. (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 938.) "[A] trial court *must* order a joint trial as the 'rule' and *may* order separate trials only as an 'exception.' [Citation.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 190.)

Given the circumstances surrounding the shooting, it is not reasonably likely the court would have invoked that exception with respect to Reyes. In fact, "[t]his was a classic case for a joint trial [in that] all defendants faced equivalent charges, most of the evidence was cross-admissible, and there was strong evidence against each defendant." (*People v. Avila* (2006) 38 Cal.4th 491, 575.)

As an alternative to severance, the trial court could have bifurcated the gang allegations from the other charges. However, that course of action is rarely invoked in gang cases. Indeed, our Supreme Court has made clear there is no need for bifurcation when the evidence used to establish the gang allegations is also relevant to "help prove identity, motive, modus operandi, specific intent . . . or other issues pertinent to guilt of the [other charges in the case.] [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt [on the other charges], any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050.)

That was clearly the situation in this case. The gang evidence was not only relevant in terms of establishing appellants' actions were gang related, it also shed considerable light on their motive and intent in committing the underlying offenses. Therefore, any inference of prejudice from combining the charges was effectively dispelled, and there was no need for bifurcation. (*People v. Hernandez, supra,* 33 Cal.4th at pp. 1049-1050.) Suffice it to say, defense counsel was not ineffective for failing to advocate otherwise.

In cursory fashion, Reyes also accuses his attorney of being incompetent for failing to "test the underlying facts and/or expertise of the People's gang expert" and failing to test the special circumstances allegation by making "the typical . . . motions that one would expect in this serious a case." However, Reyes doesn't say just how his attorney should have gone about pursuing these particular issues, nor does he support his claims with any factual citations or legal authority. Therefore, we need not consider them. (*People v. Smith* (2003) 30 Cal.4th 581, 616, fn. 8; *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

IV

Reyes' next argument also fails to persuade. In a single paragraph, and without citing to the record, he baldly alleges the prosecutor committed misconduct by referring to the defendants by their gang monikers during trial. No formal legal citations are provided; Reyes simply alleges "[t]his case smacked of the famous 'Sleepy Lagoon' murder case of the 1940s." Such hyperbole is rarely useful in appellate advocacy, especially when, as here, it is not supported by any substantive analysis whatsoever.

In any event, it made sense for the prosecutor to refer to the defendants by their nicknames at times, because those are the names by which many of the witnesses have come to know them. And not all of the nicknames were sinister (for example, Reyes' moniker is "Turtle"). Guerrero's nickname, "Evil," surely is, but it was also relevant, because someone in Hard Times allegedly called for Guerrero by that name during the initial fistfight. All things considered, it is not reasonably probable Reyes would have obtained a more favorable result had the defendants' gang monikers not been mentioned during the trial. Therefore, the references are not cause for reversal. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

V

Again unfettered by any record citations or legal authority, Reyes argues the court erred in failing to instruct the jury that death was not a natural and probable consequence of the fistfight that occurred prior to the shooting. The argument is premised on two points. First, Reyes' girlfriend and another defense witness testified Reyes ran away from the fight before the shooting occurred. Reyes asserts this proves he withdrew from any conspiracy that may have existed between him and his fellow gang members. But as the Attorney General correctly notes, there was an abundance of evidence Reyes was present at the time of the shooting. And even if he had left by then, there is no evidence he affirmatively repudiated the alleged conspiracy to attack

Santa Nita or communicated any such repudiation to his companions. Therefore, his departure would not have constituted an effective withdrawal from the conspiracy. (*People v. Belmontes* (1988) 45 Cal.3d 744, 793 [to withdraw from a conspiracy the defendant must "make an affirmative repudiation communicated to his coconspirators"].)

In challenging the court's instructions, Reyes also relies on Wainwright's testimony on cross-examination. Asked how many of the 300 or so gang fights he has investigated had resulted in a homicide, Wainwright said "roughly 115 to 120." Reyes argues this proves homicide was not a natural and probable consequence of the fistfight that preceded the shooting, and therefore the trial court should have so instructed the jury. However, "[w]hether one offense is a natural and probable consequence of another depends on a consideration of the full factual context the defendant faced [citation], something which mere statistics . . . cannot possibly reflect." (*People v. Lucas* (1997) 55 Cal.App.4th 721, 732, fn. 2.)

Fully aired, the facts of this case paint a picture of two rival gangs squaring off in the wake of recent hostility among its members. That, in and of itself, created a very dangerous situation. But things got even more dangerous when appellants' gang sought armed support for the battle. Once that call went out, it was only a matter of minutes before Guerrero arrived on the scene with a gun. Such is the nature of modern gang warfare. While gang encounters in days of yore might not be expected to result in death, the sad truth is, that "[w]hen rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire." (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1056; accord, *People v. Medina* (2009) 46 Cal.4th 913, 925-927 [where verbal challenges occur between rival gang members, physical violence is foreseeable].) And in that combustible context, "escalation of [the] confrontation to a deadly level [is] much closer to inevitable than . . . to unforeseeable." (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1376; see also *People*

v. Ayala (Feb. 11, 2010, A122412) __ Cal.App.4th __, __ [gunfire is a natural and probable consequence of a fistfight that arises in the "pitched battle of an ongoing gang war"].)

That being the case, the trial court did not err in instructing the jury on the natural and probable consequences doctrine. Because murder was a reasonably foreseeable consequence of the initial encounter, no instructional error has been shown.

VI

Referring to his previous arguments, Reyes lastly contends that, had his trial attorney been competent, had the prosecutor acted fairly, and had the court properly instructed the jury — i.e., had the errors he complains of not had a cumulative effect — he would not have been convicted. However, for reasons explained above, Reyes has failed to establish any errors occurred during his trial. Therefore, his final claim, like the others, also fails.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

ARONSON, J.